



# महाराष्ट्र शासन राजपत्र

## असाधारण भाग चार-क

वर्ष ४, अंक ६६]

सोमवार, नोव्हेंबर १९, २०१८/कार्तिक २८, शके १९४०

[पृष्ठे २०, किंमत : रुपये १.००

असाधारण क्रमांक ९६

प्राधिकृत प्रकाशन

महाराष्ट्र शासनाव्यतिरिक्त इतर वैधानिक प्राधिका-यांनी तयार केलेले

(भाग एक, एक-अ व एक-ल यांमध्ये प्रसिद्ध केलेले वैधानिक नियम व आदेश यांव्यतिरिक्त इतर)

वैधानिक नियम व आदेश ; यात भारत सरकार, उच्च न्यायालय, पोलीस आयुक्त, आयुक्त (राज्य उत्पादन शुल्क), जिल्हादंडाधिकारी व निवडणूक आयोग, निवडणूक न्यायाधिकरण, निवडणूक निर्णय अधिकारी व निवडणूक आयोगाखालील इतर प्राधिकारी यांनी तयार केलेले वैधानिक नियम व आदेश यांचा समावेश होतो.

### ELECTION COMMISSION OF INDIA

Nirvachan Sadan, Ashoka Road,

New Delhi 110 001 dated the 10th October 2018.  
18 Asvina, 1940 (Saka)

### NOTIFICATION

No. 82/MT-LA/3/2014 (Nagpur).—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951) the Election Commission of India hereby publishes the judgment/order dated 05th April 2018 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Election Petition No. 3 of 2014.

### IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH AT NAGPUR

ELECTION PETITION No. 3/2014

Shri Sonba s/o Gulabrao Musale,  
Aged 58 years, Occ. Business,  
R/o. Behndala, Post Waki,  
Tq. Saoner, Dist. Nagpur

... Petitioner ;

Versus

1. Shri Sunil, s/o Chhatrapal Kedar,  
Aged 53 years, Occ. Business,  
R/o At Post Patansaongi, Tq. Saoner,  
Dist. Nagpur 441 113.
2. The Returning Officer,  
49-Saoner Assembly Constituency,  
Saoner, Dist. Nagpur. (Deleted)
3. Shri Manish s/o Arvind Mohod,  
Aged Major, Occ. Social Worker,  
R/o Malegaon, Tq. Saoner,  
Dist. Nagpur.

... Respondents.

Mr. F.T. Mirza, Advocate for Petitioner.

Mr. Sunil Manohar, Senior Advocate with Mr. A. Naik, Advocate for Respondent No. 1.

Mr. S. S. Ghate, Advocate for Respondent No. 3.

CORAM : V. M. DESHPANDE, J.

Date of Reserving the Judgment; 15-12-2017

Date of Pronouncing the Judgment; 05-04-2018

## JUDGMENT

### BACKGROUND OF THE PETITION

1. The petitioner Sonba Musale was intending to contest the election from 49, Saoner Legislative Assembly Constituency. He, therefore, submitted his nomination papers (Exh.-32) with the returning officer on 26th September 2014. He was intending to contest the said election as a candidate of Bhartiya Janata Party. The respondent No. 3 in the present election petition filed an objection before the returning officer (Exh.-44) and the returning officer *vide* order dated 30th September 2014 rejected the nomination paper filed by the petitioner (Exh.-47). The said act of the returning officer was challenged by filing a Writ Petition bearing Writ Petition No. 375/2014 and the Division bench of this Court dismissed the said writ petition by upholding the preliminary objection raised by the respondents in the said writ petition in respect of the tenability of the writ petition by placing reliance on the provisions of Article 329 (b) of the Constitution of India. By a detailed judgment, the Division Bench upheld the preliminary objection and dismissed the said writ petition by keeping open all points raised in the petition. The petitioner thereafter approached to the Hon'ble Apex Court by filing a Special Leave Petition bearing S.L.P. No. 27988/2014. However, the said special leave petition was withdrawn on 14th October 2014.

2. In the meanwhile, polling for the said Saoner Legislative Assembly Constituency had taken place and on 22nd October 2014, respondent No. 1 Sunil Kedar was declared as Returned Candidate by the returning officer from 49, Saoner Legislative Assembly Constituency.

3. On 1st December 2014, the petitioner presented the present election petition under Section 81 of the Representation of the People Act, 1951 (hereinafter referred to as the "Said Act" for the sake of brevity) and prayed as under :

"(i) Hold and declare that the election of the Respondent No. 1 returned candidate from 49-Saoner Legislative Assembly Constituency is void and same may kindly be quashed and set aside, in the interest of justice.

(ii) Grant any other relief which this Hon'ble Court may appears just and proper in the facts and circumstances of the present case as also in the paramount interest of justice, equity and fair play."

### PLEADINGS IN THE PETITION

4. It is pleaded that the petitioner was elected as Member of the Zilla Parishad from the constituency namely; Patansawangi during the period of 2007 to 2012. It is further pleaded that the respondent No.1,

who is returned candidate from 49, Saoner Legislative Assembly Constituency, whose election is called in question, contested the said election as a candidate set up by recognized the national political party namely; "Indian National Congress Party."

5. It is pleaded that the Hon'ble Governor of Maharashtra issued a notification under Sub- Section (2) of Section 15 of the said Act, which was published in the *Official Gazette* of the State on 20th September 2014. By the said notification, the Hon'ble Governor called upon all the assembly constituencies in the State to elect Members to the Legislative Assembly of the State, in accordance with the provisions of the said Act and rules and orders made thereunder. As per the said notification, various dates were appointed for various stages.

As per the appointed date by the Election Commission of India, the last date for making nomination was 27th September 2014. The date for scrutiny of nomination papers was 29th September 2014. The last date for withdrawal of candidature was 1st October 2014, declaration of official list of candidates was 1st October 2014. The date of the poll, if necessary, was 15th October 2014 and 22nd October 2014 was the date before which the election was to be completed. The notification issued by the Election Commission of India is at Exh. 42.

6. It is further pleaded by the petitioner that the petitioner was a partner in the partnership firm namely; "M/s. Musale Construction." As per the petition, the petitioner first time became partner in the said firm *vide* Deed of Partnership dated 5th October 1989 and lastly *vide* "Deed of Reconstitution of Partnership Change in Constitution" dated 1st October 2009 with effect from 1st October 2009. It is also pleaded in the petition itself that the said firm carries out all kinds of civil works of building, roads, canal and dams etc. It is further pleaded that the petitioner on 26th September 2014 retired from the said firm with his wife and son by executing "Deed of Reconstitution of Partnership Change in Constitution" which was notarized on the same day *i.e.* on 26th September 2014.

The petition further pleads that the petitioner has submitted his nomination paper on 27th September 2014 for the election of 49, Saoner Legislative Assembly Constituency in the requisite format with complete information and necessary affidavit, annexures and documents. It is his pleading that his candidature was set up by the recognized national political party namely ; Bhartiya Janata Party.

7. As per the pleadings in the petition, at the time of scrutiny of the nomination papers on 29th September 2014, Manish Arvind Mohod, the respondent No. 3, who was contesting in the said election from the same constituency as an independent candidate, raised an objection to the nomination papers of the petitioner that the petitioner was disqualified for being chosen as a Member of the Legislative Assembly as there are subsisted contracts between him and the State Government for execution of certain works by raising the objection in writing and submitted the same to the returning officer.

8. As per the petition, the gist of the said objection was that the petitioner is partner of "M/s. Musale Construction" and the said M/s. Musale Construction is having Government contracts which were subsisting and therefore as per Section 9A of the said Act, the petitioner was not qualified to contest the election.

9. The petition further pleads that the petitioner immediately, on the same day, filed his reply to the said objection in writing by pointing out that the petitioner along with his wife and son have retired from the partnership firm M/s. Musale Construction as partners on 26th September 2014. Therefore, he, his wife and son are no more partners in the said M/s. Musale Construction on the date of scrutiny of the nomination and there was no subsisting contracts of the petitioner with the Government. Hence, section 9A of the said Act was not applicable to the petitioner to disqualify him from contesting the election from the said constituency.

10. It is further stated in the petition that along with his reply, the petitioner submitted a copy of the Deed of Reconstitution of Partnership of M/s. Musale Construction dated 26th September 2014 to show that he, his wife and his son got retired from the said partnership firm with effect from 26th September 2014.

11. It is further the pleading of the petitioner that from the date of retirement of the petitioner from the firm, speaks for itself that firstly; the petitioner was not partner in the said firm on the date of scrutiny of the nomination and secondly there was no subsisting contract of the petitioner with the appropriate Government as contemplated under Section 9A of the Act.

12. It is his further pleading in the petition that after the reply was filed by the petitioner before the returning officer, the objector Manish Mohod filed some documents before the returning officer and thereby the work orders issued by the Public Works Department to M/s. Musale Construction were brought on record.

13. As per the pleadings, the analysis of section 9A of the Act shows that only in two cases a person would be disqualified. If he has entered into a contract with the appropriate Government in the course of his trade or business which is subsisting on the date of scrutiny of nomination and they are; (i) When the contract is one for supply of goods to appropriate Government and (ii) where the contract is for the execution of any work undertaken by that Government. If the contract belonging to either of these two categories is subsisting on the date of nomination, the person will be disqualified for being chosen as a Member.

14. As per the petition, the petitioner stood retired from the partnership firm on 26th September 2014, the nomination papers were submitted by him on 27th September 2014 and the scrutiny of the nomination papers was made on 29th September 2014. As per the petition, the relevant date to determine the disqualification under Section 9A of the Act would always be the date fixed for scrutiny of nomination. Thus, on the date of scrutiny of nomination of the petitioner, there was no subsisting contract of the petitioner with the State Government.

15. It is also pleaded by the petitioner that on 29th September 2014 i.e. on the date of the scrutiny, there was not a single subsisting contract of the petitioner with the Government. All the documents which were filed on record by the objector Manish Mohod were in relation to the contracts between M/s. Musale Construction and the State Government.

16. It is further pleaded by the petitioner that he stood retired as a partner from the said firm on 26th September 2014 i.e. three days prior to the date of the scrutiny of the nomination. The petitioner was no longer a partner of the said firm from 26th September 2014. 'therefore, it is his pleading that on the date of the scrutiny of nomination, there was no contract subsisting or otherwise between him and the State Government and therefore the provisions of section 9A of the Act are not attracted. In spite of this undisputed position, according to the petitioner, there was no subsisting contract between him and the appropriate Government on the date of the scrutiny. The returning officer rejected the nomination paper of the petitioner vide order dated 30th September 2014 on the ground that in the nomination paper filed by the petitioner on 27th September 2014 in Clause 9 of the Form 26 i.e. in the affidavit filed by the petitioner along with nomination paper before the returning officer, the petitioner has mentioned his occupation as "Government Contractor".

17. It is further the pleading of the petitioner after improper rejection of his nomination paper, the final list of the contesting candidates was published on 1st October 2014. There were total 15 candidates including the respondents. The polling was due on 15th October 2014 and on 19th October 2014, counting of the votes was done and on completion of the same, the respondent No. 1 was declared as the returned candidate from 49, Saoner Legislative Assembly Constituency. According to the petition, the respondent No. 1 got total 84,630 votes whereas; his close rival Vinod Bapurao Jivtode, who contested the said election as a nominee of Shiv Sena, got 75,421 votes, it is further a pleading of the petitioner that in Nagpur District there are 12 Assembly Constituencies out of which except 49, Saoner Legislative Assembly Constituency, in all the remaining 11 constituencies, the candidates of Bhartiya Janata Party got elected.

18. It is further pleaded that on 19th October 2014, the returning officer issued "Certificate of Election" in Form No. 22 under Rule 66 of the Conduct of Election Rules, 1961 certifying that the returning officer declared the respondent No. 1, sponsored by Indian National Congress party to have been duly elected by the said Constituency in general elections to be a member of the House of Legislative Assembly.

19. It is pleaded in the petition that in absence of any observation that the petitioner is having subsisting contract with the State Government, the returning officer ought not to have applied Section 9A of the said Act to disqualify him to contest the election. Therefore, as per the pleadings made in the petition, the nomination paper of the petitioner was improperly rejected and therefore it is pleaded that the election of the returned candidate namely the respondent No. 1 needs to be declared void under Section 100 (1) (c) of the said Act and therefore made prayers, which are reproduced *supra*.

20. In the petition, originally, apart from the respondent No. 1 returned candidate and the respondent No. 3, who raised the objection, the returning officer of 49, Saoner Legislative Assembly Constituency was also joined as the respondent No. 2.

21. On 20th November 2015, summons were issued to the respondents for settlement of issued. Initially, though the respondent No. 2, the returning officer was served, nobody put in appearance on his behalf therefore on 26th February 2016 the petition was ordered to proceed *ex-parte* against the returning officer.

22. On 02nd September 2016, two applications were filed on behalf of the returning officer. Exh.-24 was an application for setting aside *ex-parte* order and Exh. 25 was for deleting the name of the respondent No. 2 the returning officer.

23. Exh. 24 was decided on 20th January 2017. The petitioner and the respondents accorded their no objection for setting aside *ex-parte* order dated 26th February 2016 and therefore the application Exh. 24 was allowed and order dated 26th February 2016 ordering election petition to proceed *ex-parte* against the returning officer was set aside and he was permitted to participate in the proceeding.

24. Exh. 25, which was moved by the returning officer to delete his name from the array of the respondents, was not opposed by the petitioner and the respondent No. 1, the returned candidate and the respondent No. 3, the objector. In view of the same, in view of the law laid down by the Hon'ble Apex Court in *Jyoti Basu and Others Vs. Debi Ghosal and Others*; reported in AIR 1982 SC 983, and *B. S. Yadiyurappa Vs. Mahalingappa and Ors.*; reported in AIR 2001 SC 4041, the application filed on behalf of the returning officer was allowed. Consequently, his name was deleted from the array of respondents.

25. The respondent Nos. 1 and 3 filed their separate written statements.

#### WRITTEN STATEMENT OF THE RESPONDENT NO. 1

26. The written statement of the respondent No. 1 is at Exh.-14. All the pleadings of the petitioner were denied by the returned candidate by filing his written statement. His written statement contains the special pleadings also. As per the said special pleadings, the submissions made by the petitioner that he became partner of M/s. Musale Construction with effect from 05th October 1989 is contrary to the record maintained by the Registrar of Firms. His pleading shows that the register of firms with respect to the said partnership firm demonstrates that the said firm is a registered partnership firm bearing No. NGP-4483/1994-95 and the date of the registration of the firm is shown as 30th August 1994. The first entry in the register shows that the firm was constituted *vide* partnership deed dated 05th January 1989 with Rambhau Gulabrao Musale and Smt. Kalpana Sonba Musale as its partners. According to the respondent No. 1, the petitioner was not shown as partner in the register of firms with effect from 05th October 1989. Thus, to that extent the submissions made in the petition is contrary to the record.

27. It is further the special pleading of the respondent No. 1 that entries the register of firms demonstrate that the petitioner had retired as partner of the firm with effect from 23rd February 2007 and had again become the partner on 01st November 2007. it is also pleaded that the said firm, in which the petitioner is partner, regularly executes the works by entering into agreements with the Government of Maharashtra and various Zilla Parishads including the Nagpur Zilla Parishad. The said contracts with the Zilla Parishads and the Government of Maharashtra were routinely entered into by the firm in the course of his business, it is further pleaded that since the petitioner wants to contest the Zilla Parishad election in the year 2007, he tendered the resignation from the firm as a partner and had joined the firm again as partner



within a span of nine months. According to the respondent No.1, the resignation dated 23rd February 2007 was merely an eye wash to overcome the disqualification from contesting the election under Section 16 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1951. It was also pleaded that though the petitioner got himself formally inducted as partner with effect from 01st November 2007, intimation in this regard was never sent to the Registrar of Firms during his entire tenure as Zilla Parishad Member. According to the pleadings, an entry regarding his reinduction as partner with effect from 01st November 2007 is taken on 19th March 2015.

28. Thus according to the respondent No. 1, resignation in the year 2007 was nothing but an eye wash to avoid disqualification and the said fact of resignation was suppressed from the Registrar of Firms.

29. According to the returned candidate, some tactics were resorted to by the petitioner to overcome disqualification under Section 9A of the said Act. It is pleaded by the returned candidate that the petitioner filed his nomination paper on 27th September 2014 and the said nomination paper was accompanied by an affidavit in Form No. 26. The said affidavit is dated 26th September 2014. In paragraph 9 of the said affidavit, the petitioner has categorically stated that he and his wife are engaged in the profession/occupation as Government Contractors. It is also the pleading of the respondent No. 1 that in paragraph 7 (iii) of the said affidavit, the petitioner has stated that he has an amount of Rs. 1,71,95,655.63 as partner's capital in M/s. Musale Construction. Likewise, an amount of Rs. 2,13,26,637.46 was shown as partner's capital of the said firm, in the name of his wife. It is also pleaded that the partner's capital of his son in firm is stated to be Rs.46,68,831.83. It is also pleaded that the affidavit demonstrates that as on 26th September 2014 i.e. on the date of affidavit, the petitioner, his wife and son had capital investment in the partnership firm. According to the petitioner, this, coupled with the fact that the petitioner himself has stated his profession as Government Contractor, would demonstrate that the petitioner had not retired from the partnership firm on 26 September 2014, as claimed by him.

30. It is also pleaded by the respondent No. 1 that the document titled as "Deed of Reconstitution of Partnership, Change in Constitution" dated 26th September 2014 is a false document. The said document is created subsequently, in order to overcome the disqualification under Section 9A of the said Act. As per the pleadings in the written statement, had the said document been executed on 26th September 2014, the petitioner would not have stated his occupation in the affidavit dated 26th September 2014 as a Government Contractor.

31. It is also pleaded that, though the Deed of Reconstitution is dated 26th September 2014 and it is written on a stamp paper of Rs. 500, the date on which the stamp is issued from the Treasury office is not mentioned on the document. Further, the endorsement made on the stamp paper indicates that the same was purchased for payment of the stamp duty on Power of Attorney.

32. It is also the pleading of the respondent No. 1 that the Deed of Reconstitution of the Partnership is created only as an eye wash to overcome Section 9 A of the Act. The document merely recites that the petitioner, his wife and son were retired from the firm with effect from 26th September 2014. The consequences of the retirement viz. statement of account, refund of capital etc. are also not provided in the document. Thus, according to the respondent No. 1, the document is a sham document and it was never intended to be acted upon. It is also pleaded that the firm M/s. Musale Construction is a registered Contractor of Public Works Department of the State of Maharashtra. The said firm has entered into several contracts with the Government of Maharashtra. In the said contracts, there is a condition that in case where a registered contractor is a partnership firm and there is a change in the Constitution of the firm, the same would be notified to the office in charge of the work. However, the respondent No. 1 claimed in his written statement that no such intimation was however sent under any of the existing contract, which according to the respondent No. 1, demonstrates that the petitioner never intended to resign from the partnership firm and a false document was created, which was never intended to be acted upon and was, in fact, not acted upon, it is also pleaded that any change in the Constitution of the firm documents on account of induction of a new partner or retirement of an existing partner has to be approved by the State Government. The Government enters into contracts with entities such as partnership firms and companies having regard to the persons associated with such entities. The contractors are classified in different categories having regard to the credentials of the persons included in the firm as

partners. It is also pleaded that the retirement of the petitioner from the firm M/s. Musale Construction, which was registered as a Government contractor with the Public Works Department of the Government of Maharashtra, is not approved by the said department.

33. It is also pleaded by the returned candidate in his written statement that under the provisions of the Indian Partnership Act retirement of the partner from the firm is required to be notified to all the concerned. A person continues to be responsible and liable to the third parties as a partner in the firm unless the fact of retirement is notified to such third parties, is the pleading in the written statement. It is also pleaded that the petitioner has not even averred in the petition that he had notified the factum of his alleged retirement to any third parties or public at large. According to the written statement, the deed of retirement was never to be acted upon, is apparent from the conduct of the petitioner in not notifying the retirement to the public at large and to any third parties with whom the firm was dealing, including the banks, Government departments and statutory authorities dealing with the income tax, service tax, Maharashtra Value Added Tax, Shops and Establishments, etc.

34. With these basic pleadings, it was submitted by the returned candidate in his written statement that he is democratically elected public representative. Setting aside the election of an elected candidate is not only adverse to the interest of the elected candidate but also to the entire electorate. It is also pleaded that there is considerable material on record to create doubt as regards to the genuineness of the deed dated 26th September 2014 and intention to the Act on the said document and therefore according to the respondent No. 1, the returning officer has rightly rejected the nomination paper and therefore the respondent No. 1 pleaded that the election petition be dismissed.

#### WRITTEN STATEMENT OF RESPONDENT No. 3

35. The respondent No. 3, who has raised the objection in regard to the nomination form submitted before the returning officer and which were upheld by the returning officer, has also filed his written statement and it is at Exh. 13. His written statement is on the same lines as that of his objections and according to the gist of his written statement, the petitioner was having subsisting contracts with the Government and therefore he was disqualified for contesting the election. He has also prayed that the petition be dismissed.

36. In view of the rival pleadings, issues Exh.-29 were framed, those are reproduced as under :—

Sr. No.	ISSUES	FINDINGS
1.	Whether the petitioner was partner of M/s. Musale Construction on the day of scrutiny of his nomination papers for election of 49, Saoner Legislative Assembly Constituency on 29th September 2014?	YES
2.	Whether any contract of petitioner with the State of Maharashtra in the course of his trade or business as a partner of M/s. Musale Construction for the execution of any work was subsisting on the day of the scrutiny?	YES
3.	Does the respondent No. 1 prove that the document dated 26th September 2014 titled as "Deed of Reconstitution, Change in Constitution" is false, sham and bogus document?	YES
4.	Does the respondent No. 1 prove that the document dated 26th September 2014 was never intended to be acted upon?	YES
5.	Whether the nomination paper of the petitioner was improperly rejected by the Returning Officer?	YES
6.	Whether the petitioner was disqualified under Section 9-A of the Representation of People Act, 1950 on the day of scrutiny ?	YES

**EVIDENCE :**

37. The petitioner filed list of witnesses Exh.-30 by which he cited that he alone will be examined as the witness.

**ORAL EVIDENCE :**

38. Accordingly, the petitioner has examined himself and his evidence is at Exh.-31. He was cross-examined by the learned Senior Counsel Mr. Sunil Manohar for the respondent No. 1. Counsel for the respondent No. 3 declined to cross-examine the petitioner. After cross-examination of the petitioner was over, Mr. F. T. Mirza, learned counsel for the petitioner submitted that he does not wish to re-examine the petitioner.

39. Exh.-89 a closure pursis duly signed by the petitioner and his counsel was filed on record and the petitioner closed his case.

40. Respondent No. 1 filed pursis Exh. 90 so also respondent No. 3 filed pursis Exh.-91 thereby they gave up their right to examine any of the witnesses on their behalf.

41. As the evidence shows that the petitioner belong to a political party by name; Bharatiya Janata Party. The said political party asked him to contest the election from assembly segment of Saoner and to contest the said election, he has filed nomination form on 27th September 2014 and the said nomination form is at Exh.-32. He has stated in his evidence that prior to submitting the nomination paper, he reconstituted the firm in which he was a partner. According to him, reconstitution means himself, his wife and his son resigned from the said firm with effect from 26th September 2014. His evidence further shows that there was a new deed of partnership and it is styled as "Deed of Reconstitution of Partnership, Change in Constitution of M/s. Musale Construction" and the said is at Exh.-33. He deposed that notice to the Registrar of Firms regarding his resignation was given. When it was shown to him, he admits his signature on the same and it is at Exh.-34.

42. He further deposed in his evidence that on 29th September 2014, he received a phone call from Tahsil office and it was informed to him that there is an objection to his nomination paper. He was called and he was informed about the objection. He further deposed that on 30th September 2014, his nomination paper was rejected. Against his rejection and he had filed a writ petition before High Court. He deposed that thereafter now the present election petition is filed. He deposed that since he could not get a chance to contest the election, it is his prayer that the said election should be cancelled. He stated in his examination in chief that his party contested election from 11 Legislative Assembly seats out of 12 in Nagpur District. The 12th Constituency, which was left alone, was Saoner constituency. He further deposed in his examination in chief that 11 candidates belonging to Bharatiya Janata Party were declared elected from 11 Assembly constituency from Nagpur district. It further his evidence that if he had been in Saoner constituency, he would have been declared as elected. With this, he finished his examination in chief.

43. The petitioner Sonba Musale was cross examined by the learned Senior Counsel for the respondent No. 1. In his cross examination he admitted that he was partner of M/s. Musale Construction from 1st April 1998 till 2007. He took exit from the said partnership firm in the year 2007 and again entered the said partnership firm 2009. He admitted in his cross examination that M/s. Musale Construction is a registered partnership, registered with Registrar of firms. He admitted that this firm undertakes Government contracts. He admitted that this firm is registered with Government to do the works of the Government. It is also admitted by him that if the firm wishes to have Government work, it has to be registered with the Government and the firm was Class-I contractor of the Government. He stated in his evidence that at no point of time, in his individual capacity, he was a registered Government Contractor. However, he was partner of the partnership firm registered with the Government. He admitted that for such registration with the Government there is a procedure and the said procedure is to the effect to supply the documents regarding partnership deal and individual names of the partners. He stated that this procedure is given in the Public Works Department's manual.

44. In his cross examination, he has admitted that on 26th September 2014, he has sworn an affidavit at Saoner in respect of nomination of election. He admitted in the said affidavit that he is a Government contractor. However, he explained that at no point of time, he was Government contractor in



individual capacity. He stated in his evidence that he was a partner of M/s. Musale Construction, a registered Government firm till 26th September 2014 and he signed a resignation letter at about 2.00 p.m. on 26th September 2014 at; Nagpur. He stated that the deed is notarized and the notary came to his office for the same. He claimed that he is not aware when the said document was sent to the Registrar of Firms by M/s. Musale Construction.

45. He has admitted that though he has resigned from the partnership firm, he kept his capital with the said registered partnership firm.

He also stated in his cross examination that on 29th September 2014, he got information about the objection being taken to his nomination paper and it was read by him completely. He stated that along with the said objection, there was a list showing the pending Government works towards M/s. Musale Construction and he did not object to the same. He further stated that till 26th September 2014, there were numerous ongoing contracts of M/s. Musale Construction and out of that at least four contracts were awarded to the construction firm in the month of September only. It is also his statement in the cross examination that it might be possible that the duration of the completion of those Government contracts was within three months to six months. He admitted in his cross examination that the contracts are required to be signed either by all partners or by Power of Attorney Holder of the partners.

46. His attention was drawn to Exh.-79 which was the work order dated 08th September 2014. He admitted that the conditions of the said work order are binding. His attention was invited to condition No. 28. He admitted that the said condition is correct. He has also admitted as true that he has not mentioned in his reply filed with the returning officer regarding non communication to the Government or Public Works Department since it was not felt necessary by him. Similarly, he has stated that in the election petition also it is not stated that he communicated to the Government or the Public Works Department. He has also admitted that he has not filed any document along with the election petition regarding the factum of communication either to the Government or to the Public Works Department. He has admitted as true that the manual of the Public Works Department is having binding nature on all the contractors.

47. He has also admitted the contents of his affidavit filed along with his nomination paper in respect of his capital and also stated the capitals of his wife and son.

48. He has admitted that in the deed of retirement, it is mentioned that the capital will carry 12 per cent. interest and according to him, it is his remuneration. He has admitted that he got reinducted in the firm on 01st November 2014. He also admitted that he received interest on capital after his reinduction. It is also admitted by him that at the time of his retirement on 26th September 2014 accounts of the firm were not settled. It is also admitted by him that due to his reinduction in the firm, it was never settled. He admitted as true that he continued as a partner because his nomination paper was rejected.

49. He admitted in his cross examination that he is worker of Bhartiya Janata Party and since there was a mandate to him from his party, he contested the election. He admitted that he got mandate on 25th September 2014 and due to this mandate, he resigned from the firm. It is also admitted that since he could not contest the election, he rejoined to the firm immediately.

50. He made a statement in his cross examination that he is not recollecting the date when he has intimated about his resignation in the year 2007. He admitted that though it was necessary to give intimation about the same to the Government, it remained. He also admitted in his cross examination that he gave back dated information to the Registrar of Firms on 01st November 2014. He admitted that though the Retirement Deed is dated 26th September 2014 (Exh.-72) it was attested on 01 November 2014 though the said document is dated 26th September 2014.

#### **DOCUMENTARY EVIDENCE :**

51. Along with the petition, the petitioner filed Exh.-5, the list of documents. Under the said list, 13 documents were filed. The petitioner gave notice to admit documents which is at Exh.-38. Along with the said notice to admit documents, list of the documents filed by the petitioner is also filed and it is at Exh. 39.

The list contains 13 documents. The respondent No. 1 under Exh. 40 filed his reply to the notice to admit documents filed by the petitioner. By the said reply Exh. 40, the respondent No. 1 disputed document No. 4 *i.e.* Deed of Reconstitution of Partnership of M/s. Musale Construction dated 26th September 2014. Though the respondent No. 1 admits that the said document was produced by the petitioner before the returning officer on 29th September 2014, the respondent No. 1 denied the contents, genuineness and the execution of the document on 26th September 2014. All other documents were admitted by the respondent No. 1.

52. Similarly, the respondent No. 1 gave notice to admit documents under Order XII 12 Rules 2 and 3 of the Code of Civil Procedure read with Section 87 (1) of the said Act. The said notice to admit documents is at Exh. 35. Along with the said application, list of documents was also filed by the respondent No. 1. The said list contains 35 documents. The said list is at Exh. 36. It is to be noted that these documents were already filed on record along with list Exh. 22 on 19th August 2016.

53. The petitioner has filed his reply to Exh. 35 *i.e.* notice to admit documents in respect of 35 documents. The reply is dated 05th December 2017 and *vide* said Exh. 37, the petitioner had admitted all the documents as specified in the list of documents attached with notice to admit documents.

54. In view of the said documents filed on behalf of respondent No. 1 at Sr. Nos. 1 to 35, they are exhibited at Exhs. 52 to 86.

## SUBMISSIONS

### (a) Election Petitioner

55. Mr. T. A. Mirza, learned counsel for the election petitioner, strenuously urged before me that the order passed by the returning officer dated 30th September 2014 (Exh. 47) rejecting the nomination paper of the election petitioner is erroneous and cannot stand to the scrutiny of law. He submitted that perusal of the said order shows that the returning officer did not record any finding about the subsisting contract in between the petitioner and the appropriate Government. He submits that wrongly the provisions of Section 9-A of the said Act are applied. He submitted that the returning officer considered only item No. 9 of the affidavit of the petitioner filed along with the nomination papers that the petitioner is a "Government Contractor" and entry regarding the "Partner Capital" to reject the nomination paper. He submitted that the returning officer did not record any finding that the petitioner was having any subsisting contract with the State Government, either for supply of goods or for execution of the works undertaken by the Government. It is his statement that without recording either of these two findings, the application of Section 9-A of the said Act is erroneous.

56. It is his submission that during the course of cross-examination of the petitioner and in view of the various documents produced on record by the respondent No. 1 the returned candidate, nothing is established on record that there existed any contract in his personal name or in the name of his spouse in her personal capacity with the appropriate Government. He submitted that by executing the document Exh.-33 *i.e.* the Deed of Reconstitution of Partnership Change in Constitution, the petitioner, his wife and son stood retired from the partnership firm *w.e.f.* 26th September 2014. He submitted that the returning officer had enlarged the scope of Section 9A of the said Act. He therefore submitted that the returning officer committed grave mistake at law in rejecting the nomination paper of the petitioner thereby denied him an opportunity to contest the election. He relied on following case laws :—

(1) Addanki Narayanappa and anr. Vs. Bhaskara Krishnappa (Dead) and thereafter his heirs and others ;

AIR 1966 SC 1300 ;

(2) Thampanoor Ravi Vs. Charupara Ravi and ors.

AIR 1999 SC 3309

(3) Kartar Singh Bhadana Vs. Hari Singh Nalwa and Ors ; 2001 (4) SCC 661 ;

(4) Pamuru Vishnu Vinodh Reddy Vs. Chillakuru Chandrasekhara Reddy and ors. ; 2003 (3) SCC 445,

(5) Shrikant Vs. Vasantrao and ors; 2006 (6) SCC 682.

(b) RESPONDENT No. 1 :

57. Mr. Sunil Manohar, learned Senior Counsel for the returned candidate, with most persuasive manner and with equal vehemence put forth the case of the returned candidate by taking survey of various provisions of the various Acts.

58. According to him, if the submission of the learned counsel for the petitioner are accepted then the scope of election petition is confined for limited purpose as to whether the decision making process of the returning officer is justified or not. In other words, it is submission that the petitioner wishes to point out to the Court that the scope of the election petition is too limited to see whether the returning officer was justified in rejecting the nomination paper and nothing more. He submitted that these submissions on behalf of the petitioner are contrary to the entire scheme of the said Act. He submitted, by taking recourse to Section 100, the election petitioner has to make out a ground and it is the opinion of the High Court that would prevail as to whether the nomination paper was improperly rejected or not. He submitted that the proceedings in the election petition are not in the nature of appeal jurisdiction or under the powers of the superintendence. However, these are original proceedings and "Opinion of the High Court matters finally irrespective of the finding recorded by the returning officer."

59. He submitted by pointing out the various provision of the Indian Partnership Act, 1932, that the document Exh.-33 is just a device to circumvent the provisions of Section 9-A of the said Act. He submitted that admittedly all the contracts with the appropriate Government were with M/s. Musale Construction of which the petitioner is one of the partners. Therefore, the contract in respect of the ongoing constructions was with the partnership firm and is collectively and severally with the petitioner.

60. He also submitted that Section 42 of the Contract Act speaks about the joint and several liability of the persons who are promissors to fulfill the promises. He invited my attention to the provisions of Sections 62 to 67 of the Contract Act to show that these are the exceptions to Section 42 which fall under the heading "Contract which need not be performed."

61. He submitted that the Court is required to interpret Section 9-A of the said Act in the light of ;

(i) is there any subsisting contract or whether contract has generally come to end ; and

(ii) whether the petitioner is using the document (Exh.-33) to camouflage or to hide the contract which is subsisting ?

He submitted that the petitioner has, by bringing into existence of Exh.-33, created a mirage to hide the subsisting contract with the Government. He invited my attention to Exh. 33 dated 26th September 2014 to point out that it is between the family members of the Musale family. He submitted that there is no positive submission in this document that the petitioner, his wife and son stood retired. According to him, it is not the deed of retirement as there is nothing to show as to from what date, they stood retired. He submitted that this document is only a make belief document. He submitted that the petitioner himself is maker or author of this document. He submitted that no evidence is brought on record to show that when Exh.-33 was in fact executed on the date it is mentioned, no witness or the notary before whom the document was notarised is examined. He submitted that this document was brought into existence only after objections to his nomination paper were raised. He also relied on various authoritative pronouncements which are as under:

(1) Birad Mal Singhvi Vs. Anand Purohit ;  
AIR 1988 SC 1796.

(2) N. T. Veluswami Thevar Vs. G. Raja Nainar and Ors;  
AIR 1959 SC 422.

- (3) Uttamrao Jankar Vs. Ranjitsingh Mohite Patil  
(2009) 13 SCC 131.
- (4) Munshi Ram and ors. Vs. Municipal Committee, Chheharta  
(1979) 3 SCC 83.
- (5) Syndicate Bank Vs. R.S.R. Engineering Works and Ors.  
(2003) 6 SCC 265.
- (6) V. Subramaniam Vs. Rajesh Raghuvandra Rao  
(2009) 5 SCC 608.
- (7) Ashutosh Vs. State of Rajasthan and Ors.  
(2005) 7 SCC 308
- (8) Chatthurbhuj Jasani Vs. Moreswar Parashram and Ors.  
AIR 1954 SC 236.
- (9) Election Commission of India Vs. Bajrang Bahadur Singh & Ors.;  
(2015) 12 SCC 570.
- (10) Konappa Nadgouda Vs. Vishwanath Reddy and anr.  
AIR 1969 SC 447.
- (11) Sewaram Vs. Sobaran Singh;  
AIR 1993 SC 212.
- (12) Rajeshkhar Basvaraj Patil Vs. Subhash Kallur & Ors.  
(2002) 8 SCC 467.
- (13) P. H. Paul Manoj Pandian Vs. P. Veldural  
(2001) 5 SCC 214.
- (14) Chalimenda Lakshmi Narsimha Rao Vs. Chenndi Sudhakar Rao & Ors.;  
AIR 2009 AP 117.

62. The counsel for the respondent No. 3 adopted all the submissions advanced by Mr. Sunil Manohar, learned Senior Counsel for the respondent No. 1.

#### **CONSIDERATION :**

63. The issues as framed would show that issue Nos. 1 to 4 arise out of the pleadings and answer to the issue No. 5 will be consequential to the answer given to issue No. 6.

I propose to deal with all the issues simultaneously so as to avoid repetition.

64. The last date for submission of the nomination papers was 29th September 2014. The nomination paper (Exh. 32) was filed by the petitioner on 27th September 2014. The respondent No. 3-Manish Mohod has filed objection (Exh. 44) to the nomination of the petitioner. Along with the objections, the respondent No. 3 submitted the list of ongoing Government constructions which were awarded to M/s. Musale Construction. There is no dispute on the part of the petitioner that on the date of filing of his nomination paper and on the date of scrutiny of the nomination papers, there were ongoing contracts in between the Government and M/s. Musale Construction, it is also not in dispute that the petitioner was one of the partners of M/s. Musale Construction. It is his case that by execution of the document *i.e.* Deed of Reconstitution of Partnership Change in Constitution (Exh. 33) on 26th September 2014, his ties with M/s. Musale Construction have come to an end and therefore there was no existing on ongoing contract in his personal capacity with the State Government. It was in fact his reply (Exh. 45) filed before the returning officer regarding objection to his nomination papers.

65. By order dated 30th September 2014 (Exh. 47), the returning officer rejected the nomination paper. This order passed by the returning officer was taken up before this Court by the petitioner in the writ jurisdiction by filing Writ Petition No.5375/2014. It was dismissed on 7th October 2014 as untenable. The order passed by this Court was taken up before the Hon'ble Apex Court in Special Leave Petition No. 27988/2014 which was withdrawn by the petitioner on 14th October 2014. In the meanwhile, after the election process, the returning officer issued a certificate of election (Exh. 50) in favour of the respondent No. 1 on 19th October 2014.

On 1st December 2014, the present election petition under Section 81 of the said Act is filed.

66. First, I would like to deal with the scope of the election petition. This was so required in view of submissions of Mr. Mirza, learned counsel for the petitioner about non recording of the finding by the returning officer while rejecting the nomination paper of the petitioner.

67. Chapter II of the said Act deals with the presentation of the election petition to the Election Commission.

Section 80 states that no election shall be called in question except by an election petition presented in accordance with the provision of this part.

Section 81 of the Act states that an election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at the state of election or any elector within the time specified in the said section.

68. To establish the charges of the election petition who should be joined as parties to the petition, are given in section 82 of the said Act. What shall be the contents of the election petition is stated in section 83 of the Act. What reliefs can be claimed by the election petition are mandated in section 84.

69. Chapter IV provides for trial of election petitions.

Section 87 deals with the procedure before the High Court. It shows that every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of the suits.

Section 100 gives grounds on which the election can be declared as void, in fact, the election petition's presentation under section 81 of the said Act has to be on one or more of the grounds specified in sub-section (1) of section 100 and section 101 of the said Act.

In the present case, the ground for the election petition is that the nomination of the petitioner improperly rejected by the returning officer.

70. Section 36 of the said Act deals with the scrutiny of nominations. Section 36 (1) mandate the returning officer to afford reasonable facilities for examining the nomination papers of all the candidates which have been delivered within time either to the candidate, their election agents or one proposer of each candidate or one other person duly authorised by each candidate. The returning officer then is duty bound to examine nomination paper and is required to decide all objections made to any nomination paper and may either on the such objection or on his own motion, after the such summary inquiry as he thinks necessary, reject any nomination paper on any of the grounds as specified under the said section.

71. The act of the scrutiny is prior to the date of withdrawal of candidature in the election programme. It is always open for a candidate, though his nomination papers were found to be in order and accented, to withdraw himself from the contest. As per the programme, 29th September 2014 was the date of scrutiny. The date of withdrawal of the candidate was 1st October 2014 and if required the polling was to be on 15th November 2014. The time lag in between the date of scrutiny, date of withdrawal of the candidature and the date of the poll, is in my view one of the indication as to why it is observed by the Legislation, in sub-section (2) of section 36 that after such summary inquiry about a particular nomination, the returning officer will take an appropriate decision.

Further, the returning officer, after the said summary inquiry on such objections to any nomination paper is required to pass an order either accepting or rejecting the nomination papers. However, even in a case when no objections are raised to any nomination paper on any grounds as mentioned in sub-section (2) of section 36, he can reject the nomination on his own motion.

72. Section 81 of the Act does not limit the presentation of the election petition only to the candidates who either contested the election or whose nomination paper is rejected. There is a right in favour of the elector to present an election petition through which he can call in question an election of the returned candidate on one or more of the grounds as specified under section 100 of the Act. This is required to be



observed because in the present case, the objection was taken to the nomination paper by the respondent No. 3—Manish Mohod on the basis of which the nomination paper of the petitioner was rejected. Had his nomination paper been accepted by the returning officer that would not have barred any elector to approach to the High Court to question the election.

73. Section 100 of the said Act states that election can be declared void if it is the opinion of the High Court, as mentioned in clauses (a) to (d) of sub-section (1) subject to the provisions of sub-section (2). Therefore what is important is the opinion of the High Court. In that context, it is not open for the petitioner to submit before this Court that the returning officer has committed wrong and/or his nomination paper was erroneously rejected by him by not recording certain finding. In fact, it is for the petitioner to place the material before this Court and to prove that his nomination paper was improperly rejected. Simultaneously, then it was open to the returned candidate to show that the nomination of the election petitioner was not improperly rejected. After the appreciation of the respective claims of the parties to the election petition, the High Court has to form its opinion as to whether the nomination paper was improperly rejected by the returning officer.

74. In that view of the matter, I am not in agreement with the learned counsel for the petitioner that this Court should record a finding that because the order passed by the returning officer *sans* finding about the existence of the subsisting contract between the petitioner and the appropriate Government, this Court should form an opinion that the nomination paper of the petitioner was improperly rejected.

75. Spirit of section 9-A of the said Act is not in res integra. In *Chaturbhui Jasani Vs. Moreshwar Parashram and ors*; supra, it is laid down that the purpose of the Act is to maintain the purity of the Legislators and to avoid the conflicts between the duty and interests. The Honble Apex Court rules that the purpose of the Act is to maintain the purity of the legislatures and to avoid a conflict between duty and interest. It is obvious that the temptation to place interest before duty is just as great when there is likely to be some difficulty in recovering the money from Government.

76. In *Election Commission of India Vs. Bajrang Bahadur Singh and Ors.* reported in (2015) 12 SCC 570, the Hon'ble Apex Court has taken survey of all the previous decisions including; *Konappa Raudrappa Nadgouda Vs. Vishwanath Reddy*; reported in AIR 1969 SC 447, and *Shrikant Vs. Vasatrao*; reported in (2006) 2 SCC 682. In fact in *Shrikant Vs. Vasatrao*, in paragraph 20, the Hon'ble Apex court has observed thus—

“20. The object and intent of section 9A of the Act is to maintain the purity of the legislature and to avoid conflicts between duty and interest of members of Legislative Assembly and Legislative Council, the said object is sought to be achieved by ensuring that a person who has entered into a contract with the State Government and therefore liable to perform certain obligations towards the State Government, is not elected as a member of the Legislative Assembly or Legislative Council lest he should use his influence as an elected member of legislature to dilute the obligations or to seek and secure undue advantages and benefits in respect of the subsisting contracts. It seeks to ensure that personal interests will not override his duties and obligations as a member of Legislature or Legislative Council for the purpose of section 9-A, what is relevant is whether the candidate has a subsisting contract with the appropriate Government (in this case, the State Government) either for supply of goods to the State Government or for execution of any work undertaken by the State Government.”

77. In the present election petition, only the petitioner entered into the witness box. Voluminous documents were filed on record on behalf of the respondent No. 1—returned candidate. All those documents filed on behalf of the respondent No. 1 were admitted when notice to admit document (Exh.-35) was given by the respondent to the petitioner. Simultaneously, the respondent No. 1 also admitted all documents except the Deed of Reconstitution of Partnership of M/s. Musale Construction dated 26th September 2014 (Exh. 33). Though the production of this document before the returning officer was admitted by the respondent No. 1, he denies the contents, genuineness and execution of the documents.

78. Admittedly, according to the petitioner, till execution of the said document, the petitioner was one of the partners in M/s. Musale Construction. It is also an admitted position on record that on the date of scrutiny, there were ongoing contracts in existence in between M/s. Musale Construction and the appropriate Government. It is also an admitted position that when those contracts were awarded to M/s. Musale Construction, the petitioner was its partner.

79. According to the petitioner, by virtue of the document Exh. 33, his relations with M/s. Musale Construction have come to an end and there was no impediment for him to contest the elections. On the contrary, it is the bone of contention of the respondent No. 1 that document (Exh. 33) is a make belief document, it is brought in to existence only after the objections were raised regarding the nomination of the petitioner. According to the respondent No. 1, the said document was never intended to be acted upon.

80. Section 4 of the Indian Partnership Act, 1932 deals with the definitions of “Partnership”, “Partner”, “Firm” and “Firm-name”. in *Munshi Ram and Others Vs. Municipal Committee. Chheharta*; reported in (1979) 3 SCC 83 in paragraph 17 while considering Section 4 of the Partnership Act, the Hon’ble Apex Court found as under :

“17. ‘Partnership’ as defined in Section 4 of the Indian Partnership Act, 1932, is the relation between persons who have agreed to share the profits of a business carried on by all or any of them for the benefit of all, the Section further makes it clear that a firm or partnership is not a legal entity separate and distinct from the partners. Firm is only a compendious description of the individuals who compose the firm. The crucial words in the definition of ‘partnership’ are those that have been underlined. They hold the key to the question posed above. They show that the business is carried on by all or any of the partners. In the instant case, admittedly, all the plaintiff-appellants are carrying on the business in partnership. All the six partners are sharing the profits and losses. All the partners are jointly and severally responsible for the liabilities incurred or obligations incurred in the course of the business. Each partner is considered an agent of the other. This being the position, it is not possible to hold that each of the six partners is not carrying on a trade or calling within the purview of clause (b) of Section 61(1) of the Municipal Act. At the most, it can be said that each of these six persons is severally as well as collectively carrying on a trade in the Municipality, there is nothing in the language of Section 61 or the scheme of the Municipal Act which warrants the construction that persons who are carrying on a trade in association or partnership with each other cannot be individually taxed under clause (b) of section 61(1). On the contrary, definite indication is available in the language and the scheme of this statute that such partners can be taxed as persons in their individual capacity. As noticed already, clause (b) makes it clear in no uncertain terms that this is a tax on ‘persons,’. Its incidence falls on individuals, who belong to a class practising any profession or art ; or carrying on a trade or calling in the municipality. To hold that persons who are collectively carrying on a trade in the municipality cannot be taxed individually, would be to read into the statute words which are not there. There are no words in clause (b) or elsewhere in the statute which, expressly or by necessary implication, exclude or exempt persons carrying on a trade collectively in the municipality from being taxed as individuals. To attract liability to a tax under this clause, it is sufficient that the person concerned is carrying, on a trade in the municipality, irrespective of whether such trade is being carried on by him individually or in partnership with others, thus, both the conditions necessary for levying a tax under clause (b) of sub-section (1) of section 61 of the Municipal Act existed in this case. The appellants are “persons” and they are carrying on a trade in Chheharata Municipality. ”

81. So also in *V. Subramaniam Vs. Rajesh Raghuvandra Rao*; reported in (2009) 5 SCC 608. the Hon’ble Apex Court ruled as under :

“11. It may be mentioned that a partnership firm, unlike a company registered under the Indian Companies Act, is not a distinct legal entity, and is only a compendium of its partners. Even the

registration of a firm does not mean that it becomes a distinct legal entity like a company. Hence the partners of a firm are co-owners of the property of the firm, unlike shareholders in a company who are not co-owners of the property of the company."

82. Thus, even after registration of the firm, it is not a distinct legal entity like a company. The Hon'ble Apex Court has ruled that the partners of the firm are co-owners of the property of the firm unlike the shareholders in company who are not the co-owners of the property of the company.

83. As per Section 18 of the Partnership Act, a partner is an agent of the firm. Section 19 deals with the implied authority of the partners and agents of the firm. What is important is Section 25 of the Act. The said is reproduced hereinbelow.

"25. Liability of a partner for acts of the firm.—Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner."

84. In my view, since it is an admitted position that all the contracts with the Government were executed with M/s. Musale Construction, of which the petitioner, at the time of award of contract was a partner, he cannot absolve himself from any of the liability and/or he cannot set up a document for retirement which, in my view, is nothing but a devise to upset the binding contract and liability, if the plain meaning is to be given to the provisions of Section 25 of the Partnership Act.

85. Mr. Sunil Manohar, the learned Senior Counsel for the respondent No. 1, urged before me that since the partnership is compendious name of the partners, it is quite possible for the Government to consider the status of the petitioner in his individual capacity while awarding contract to M/s. Musale Construction of which he is one of the partners. He submitted that in absence of any positive material on record, the worthiness of the petitioner in his individual capacity must have weighed with the appropriate Government while awarding the contract with M/s. Musale Construction.

86. In the present case, the ongoing contracts with M/s. Musale Construction with the appropriate Government were not terminated after retirement of the petitioner in view of the execution of the document (Exh. 33). Thus, the contracts which were awarded in favour of M/s. Musale Construction prior to the execution of the document (Exh. 33) are still going on. Therefore, in my view, there is force in the submission of the learned Senior Counsel and therefore the petitioner himself unilaterally cannot separate himself from the ongoing contracts with the appropriate Government, especially when admittedly no notice of change of such partnership and/or intimation of document (Exh. 33) was given to the appropriate Government or its department which entered into the contracts with M/s. Musale Construction.

87. Section 32 of the Partnership Act deals with the retirement of the partner. sub-sections (2), (3) and (4) of the said section are the most relevant. In the present case, admittedly, no notice as contemplated under sub-section (4) of Section 32 in respect document (Exh. 33) was given. The law on this point is well crystallized in the authoritative pronouncement of the Hon'ble Apex Court in *Syndicate Bank Vs. R.S.R, Engineering Works and Ors.*, reported in (2003) 6 SCC 265. Paragraph Nos.5 and 6 are reproduced hereinbelow.

"5. At the time when the appellant advanced the money to the first respondent firm, respondent Nos. 2, 3 and 4 were its partners. They admitted that they executed the requisite documents in favour of the appellant. Thereafter the firm was alleged to have been dissolved on 28.7.1976. They contesting respondents have no case that any public notice was given about the retirement of respondent Nos. 2 and 3 from the firm as envisaged under section 32 (3) of the Indian Partnership Act Respondent Nos. 2 and 3 have contended that the appellant was aware of the dissolution of the partnership but that by itself will not absolve the liability of the retiring partners. Section 32 of the Indian Partnership Act, 1932, reads as follow :—

“32 Retirement of a partner. (1) A partner may retire :—

(a) with the consent off all the other partners.

(b) in accordance with the express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement :

Provided that a retired partner is not liable to any third party who deal with the firm without knowing that he was a partner.

(4) Notices under Sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm"

6. Under Sub-section (2) of Section 32, the liability of he retiring partner as against third party would be discharged only if there is an agreement made by the retiring partner, with the third party, and the partners of the reconstituted firm. Of course, an agreement could be implied by the course of dealing between such third party and the reconstituted firm, after retirement of a partner. In the instant case, there was no agreement between the appellant bank and respondent Nos. 2 and 3 as regards their liability in respect of the dissolved firm. There is also no evidence to show that there was an implied contract between the appellant and respondent No. 4 who allegedly agreed to discharged the liabilities of respondent Nos. 2 and 3. It is also pertinent to note that there was no public notice under Sub-section (3) of Section 32 of the Indian Partnership Act by respondent Nos. 2 and 3. Even if there was a public notice, it may not alter the position as the alleged liabilities of respondent Nos. 2 and 3 were incurred by them prior to the so called dissolution of the firm.”

88. There is nothing available on record about any of the liability with the third party namely; appropriate Government *vis-a-vis* retiring partner, the petitioner. In that view of the matter, merely because a document (Exh. 33) is brought into existence, that may not absolve the petitioner, till all the ongoing contracts in between M/s. Musale Construction come to an end in view of the fact that there is every possibility that at the end of contract, there may occur any liability to be shouldered by the petitioner.

89. In this contest, it is necessary to look into the evidence of the petitioner. Paragraph 10 of the evidence of the petitioner's cross-examination (Exh. 31) reads as under :

“10. It is true that in the deed of retirement it is mentioned that the capital will carry 12% interest. According to me, it is remuneration. It is true that I got myself re-inducted in the firm on 1st November 2014. It is not correct that in the intervening period. I was operating bank accounts. It is true that I received interest on capital after my re-induction. At the time of my retirement on 26th September 2014, accounts of the firm were not settled. It is true that due to my re-induction in the firm, it was never settled. It is true that I continued as a partner because my nomination paper was rejected.”

90. Admittedly, on the day of execution of the document (Exh. 33), accounts of partnership firm were not finally settled. Clause (4) of the said deed (Exh. 33) recites that there will not be any change in the capital of the firm's funds though it permits bringing additional capital into firms coffers. Clause (5) states and it is admitted also by the petitioner in his evidence that 12% interest was required to be given to the respective capital accounts. In view of the fact that on the day when the document (Exh.-33) was brought



into existence, the accounts were not settled nor the petitioner walks away with all his capital in the firm which shows that in spite of the fact that the document (Exh. 33) is executed, still his share of the capital is part and parcel of the total capital of M/s. Musale Construction. Not only that, he is also entitled to receive 12% interest on his capital. Therefore, in my view, even on execution of the document (Exh. 33), still he has retained his right to claim 12% interest on the capital, which ultimately will be derived from the profits from the ongoing contracts with the appropriate Government. Not only that, in his cross-examination the petitioner states that this 12% interest is, according to him, remunerations which is also indicative of the fact that he has not in fact opted retirement.

91. Section 42 of the Indian Contract Act deals with the devolution of joint liabilities. Exception to this is Sections 62 to 67 which are; (i) novation, (ii) remission, (iii) recession and (iv) neglect of promise to perform his part. Apart from this, there is one contingency i.e. termination of contract. These exceptions to Section 42 are only by way of the above. In the present case nothing that sort of has happened. Therefore, Section 42 of the Contract Act will apply in the present case with its full force.

92. The document (Exh. 33) is not having any positive statement that from what date the retiring partners stood retired. Further, the deed of retirement dated 26th September 2014, which was filed with the Registrar of the Firm is separately exhibited and it is exhibited as Exh. 72. The said is attested on 01st November 2014 though it is dated 26th September 2014. When the petitioner's attention was drawn to this document, he was required to admit that the stamp paper on which this document of Deed of Retirement is executed was purchased on 15th September 2014 and it was purchased for preparing. General Power of Attorney. Though he has tried to give an explanation that due to mistake the said has occurred, the petitioner and any of the partners have not put dates below their signatures. Perusal of the said document shows that it was signed in presence of two witnesses and it was attested by the notary on 26th September 2014. it was always open for the petitioner to examine the attesting whiteness or even the notary before whom the document was endorsed that the document was executed on 26th September 2014. This assumes importance because the said is attested on 1st November 2014 and it was filed after it is attested before the Registrar.

93. Disputed document also does not give any idea as to why the retired partner wishes to retire from the firm. This is important because immediately after nomination paper was rejected, the petitioner is re-inducted in the firm as a partner. The petitioner's evidence show that only for four days i.e. from 26th September 2014 to 29th September 2014, the petitioner was not partner of M/s. Musale Construction.

94. As required, the petitioner has filed an affidavit along with the nomination paper (Exh. 32). Had he stood retired from, the partnership firm, there would have no occasion for him to state on oath about his occupation as a "Government Contractor". Further, in his affidavit, he has stated on oath that he has kept his capital as it is with M/s. Musale Construction.

95. It is also brought on record by respondent No. I through the documents which are duly admitted by the petitioner pertaining to him that in 2007 also he had contested elections of Zilla Parishad. Deed of reconstitution (Exh. 64) is pertaining to year 2007. Thereafter there is again a deed of reconstitution (Exh.-66) of the year 2007 re-inducting the petitioner. There is Form-D (Exh. 70) about the change of address on 26th September 2014. Though this change has occurred on 26th September 2014, the said document is filed before the Registrar on 26th November 2014. If on 26th September 2014, the petitioner was not the partner, there was no occasion for mentioning his name as partner in Form-D. All other documents like Exhibits 71, 72 and 75 and onwards are not mentioned in the election petition. There is nothing on record to show that the petitioner has intimated and/or M/s. Musale Construction has intimated to the department about the change. In his evidence, the petitioner has further admitted that the contents in the work order are binding. One of such work order (Exh. 79) was confronted to the petitioner. His attention was drawn to condition No. 28 of the said document and he was required to admit that the said condition is correct. In spite of that, he admitted that he has not mentioned in his reply to the returning officer regarding non communication to the Government or the Public Works Department. He has also admitted that even in the election petition, he did not state that the said fact was communicated to the Government or Public Works



Department nor he has filed any document along with the election petition showing the communication either to the Government or to the Public Works Department. This has its own impact since the petitioner himself has admitted in his evidence that the manual of the Public Works Department is having a binding nature on all the contractors.

96. Clause 28 of Exh. 79 deals with changes in the constitution of the firm to be notified. It reads as under:

*"28. in the case of a tender by partners, any change in the constitution of the firm shall be forthwith notified by contract to the engineering incharge for his opinion."*

Once the petitioner himself was aware that this condition is having binding nature and when ongoing contracts between M/s. Musale Construction, in which the petitioner was partner, were in existence on the day of execution of the disputed document (Exh.-33), it was binding on the petitioner before filing of the nomination paper to intimate about the change of the constitution of the firm as required under the ongoing contracts. Had such been intimated, it was always open for the Government or the department either to accept or to reject the constitution, though, then it was open for the petitioner to question its correctness. This could have happened since this Court is of the view that before awarding the contract to M/s. Musale Construction, it is quite possible that the fact that petitioner is one of the partners must have weighed in favour of M/s. Musale Construction at the time of awarding the contract.

Therefore, the unilateral action of the petitioner cannot be construed as he retiring from the partnership firm.

97. This reasoning of mine gets support from the observations in paragraph 40 of *Rajshekhar Basavraj Patil Vs. Subhash Kallur and ors; supra*. Paragraph 40 the said Judgment reads thus :

*"40. Thus, we find that there is neither unilateral nor mutual termination of subsisting contract by respondent No. 1. in the affidavit dated 13th August, 1999, it was stated that his application or request for termination of contract was "under consideration" of the department. Unless there was acceptance of the said request by the department, it could not be said that the contract stood terminated by mutual consent. The department accepted the request made by the respondent only in September, 2000. To support the case of unilateral termination of the contract, as advanced by the learned counsel on behalf of the returned candidate before us, there is nothing on record except the pleas developed step by step which varied from the stage of filing written statement to oral evidence and thereafter at this appellate stage."*

98. In *Chalimeda Lakshmi Narasimha Rao Vs. Chennadi Sudhakar Rao & Ors.* : reported in AIR 2009 AP 117, the election of the returned candidate was challenged on the ground that the returned candidate was partner of a firm which has a subsisting contract with the Government. In paragraph Nos. 26 and 27, it is observed by the Andhra Pradesh High Court as under :

*"26. In case the elected candidate i.e., the first respondent wanted to put an end to the contract, in the normal course of behaviour and human conduct, he should have gone personally to put an end to the contract mutually and, in case the officers concerned were not agreeable to end the contract mutually, then he could have taken the step of ending the contract unilaterally by breach taking the risk of damages. Sewaram (AIR 1993 SC 212) and Rajshekar Basavaraj Patil (AIR 2002 SC 3524). the first respondent did not even intimate his retirement from the partnership firm to the Government let alone take steps to put an end to the contract mutually or unilaterally. The question whether a retiring partner would attract disqualification under section 9-A, as long as the work awarded to the firm, of which he was a partner, remained incomplete and the contract had not been terminated, is no longer res Integra for, in P. Saibaba Rao (AIR 2008 (NOC) 166) VVS Rao, J. observed :—*

*".....Even if a firm is reconstituted in accordance with terms of the contract among partners with or without some new partners, the nature of right, title, interest and possession of the original partners does not change. Indeed, under section 47 of the Partnership Act, after dissolution of the firm, mutual rights and obligations of the partners continue notwithstanding such dissolution*

*so far as such rights and obligations may be necessary to wind up the affairs of the firm. Thus if a firm is given contract for execution of work undertaken by the Government even if an elected candidate claims that he ceased to be partner, as long as the work remains incomplete, subject to other circumstances being proved, such candidate would certainly attract disqualification under section 9-A of the Act...." (Emphasis supplied).*

27. It is evident, therefore, that the contract between the first respondent and the Government did not come to an end on the date of his nomination as it had not been terminated by any of the modes aforementioned. As the contract between him and the Government continued to subsist, on the date of filing his nomination, the first respondent stood disqualified under section 9-A of the Act and as such, under section 100(1) (a) of the Act, the election of the first respondent is liable to be, and is hereby declared void. The Returning Officer ought not to have rejected the objection petition filed by the first respondent in this regard."

### **CONCLUSION :**

99. The conspectus of the aforesaid discussion leads me to record the finding against each of the issues as under :

#### **Issue No. 1 :**

Pleadings, evidence and reading of the provisions of the Partnership Act and Indian Contract Act show that the petitioner was partner of M/s. Musale Construction on the day of scrutiny of his nomination paper for election of 49, Saoner Legislative Assembly Constituency on 29th September 2014.

#### **Issue No. 2 :**

On the day of scrutiny, there was a contract of the petitioner with the State of Maharashtra in the course of his business as a partner of M/s. Musale Construction.

#### **Issue No. 3 & 4 :**

The document dated 26th September 2014 has failed to clear the doubts about its genuineness and in fact the said document was never intended to be acted upon.

#### **Issue No. 5 :**

The nomination paper of the petitioner was not improperly rejected.

#### **Issue No 6 :**

The petitioner was disqualified under section 9-A of the Representation of People Act on the date of scrutiny.

100. In the result, the election petition is dismissed with costs.

V. M. DESHPANDE. J.,

By Order.

A. N. DAS,

Secretary,

Election Commission of India.

क्रमांक डीआयएस./प्र.क्र. ७८८/१८/३३

**सामान्य प्रशासन विभाग**

मादाम कामा रोड, हुतात्मा राजगुरु चौक,  
मंत्रालय, मुंबई ४०० ०३२,  
दिनांक १९ नोव्हेंबर २०१८.

**प्रत, माहिती व योग्य कार्यवाहीसाठी अग्रेषित.—**

- (१) प्रधान सचिव, महाराष्ट्र विधानमंडळ सचिवालय, विधानभवन, मुंबई
- (२) निवडनस्ती.

**शुभा बोरकर,**

अवर सचिव व उप मुख्य निवडणूक अधिकारी,  
महाराष्ट्र राज्य.